

APPEAL NO. 032409  
FILED NOVEMBER 5, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 22, 2003. The hearing officer determined that the respondent/cross-appellant (claimant) was not intoxicated at the time of her injury and that the claimant did not have disability.

The appellant/cross-respondent (carrier) appeals the intoxication issue, asserting that the testimony of the expert who testified was "far-fetched at best" and, therefore, not credible, and that the claimant's testimony that she was not intoxicated was insufficient to meet her burden of proof. The claimant appealed the disability issue, contending that she had disability from January 25, 2003, through the date of the CCH. Both parties responded to the other party's appeal, requesting affirmance on the issue on which they prevailed.

**DECISION**

Affirmed.

It is undisputed that on \_\_\_\_\_, the claimant, a firewatcher, sustained an injury when a piece of angle iron fell some distance, and after hitting a door, struck the claimant in the back of her hardhat knocking her to the ground. The claimant was taken to a hospital emergency room (ER), where an abrasion to her right wrist and her nose, and a hematoma to the back of her head were noted. X-rays were taken and a drug screen was performed. The claimant was treated and released to return to work. The claimant may have told her supervisor that she did not think that she would pass the drug screen. The drug screen was positive for marijuana and a confirmatory gas chromatography mass spectrometry (GCMS) test placed the level at 134 ng/ml cannabinoid metabolite. The claimant subsequently sought treatment from two other doctors, who either took the claimant off work or released the claimant to work light duty. The claimant worked as a shrimper on a shrimp boat for a few days in May 2003 before being taken off work again.

**INTOXICATION**

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication applicable to this case is the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance. Section 401.013(a)(2). As explained in Texas Workers' Compensation Commission Appeal No. 021751, decided August 26, 2002, an employee is presumed sober; however, when the carrier rebuts the presumption of sobriety with

probative evidence of intoxication, the employee has the burden of proving that he or she was not intoxicated at the time of the injury.

The hearing officer does not indicate whether she believed the positive drug screen and confirmatory report were sufficient to rebut the presumption of sobriety but we hold that was impliedly the case. The claimant sought to prove that she was not intoxicated through the testimony of a chemist (and crime lab director), who testified that it is impossible to estimate intoxication from a marijuana metabolite drug screen. The carrier labels this testimony “far-fetched,” misleading, and “without any scientific corroboration.” However, we note in a report that the carrier relies on, which referenced Department of Transportation regulations, and states that the claimant “could have been voluntarily impaired,” the doctor goes on to state “[i]t is not possible, however, to estimate the actual amount of actual marijuana in the blood in relationship to urinary metabolites.” That statement is consistent with the chemist’s testimony that tetra hydro cannabinol (THC) metabolite in a urine specimen only establishes “a recent history of consumption.”

The carrier also cites Texas Workers' Compensation Commission Appeal No. 981662, decided September 3, 1998, for the proposition that the “claimant’s testimony [alone] is simply insufficient to meet her burden [of proving sobriety] in an intoxication case.” We long ago rejected that proposition in Texas Workers' Compensation Commission Appeal No. 991181, decided July 14, 1999, and Texas Workers' Compensation Commission Appeal No. 991357, decided August 11, 1999, and most recently in Texas Workers' Compensation Commission Appeal No. 000167, decided March 10, 2000, stating that we decline to hold as a matter of law that a claimant’s testimony is insufficient to prove a lack of intoxication and established the principle that whether the claimant had sustained his or her burden of proving sobriety was a factual determination for the hearing officer to resolve. In any event, in this case the claimant relied not only on her testimony but also on the testimony of the chemist and a coworker.

## **DISABILITY**

Although the claimant on appeal, and at the CCH, referenced several later doctor’s reports of debilitating injuries, the hearing officer could and apparently did, believe that the claimant’s injuries were limited to the hematoma and abrasions listed in the ER report. The hearing officer also commented on the claimant’s work on a shrimp boat and the claimant’s relatively light preinjury job as a firewatcher. There was conflicting evidence presented on the issue of disability. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer’s decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO F. MALO  
12222 MERIT DRIVE, SUITE 700  
DALLAS, TEXAS 75251.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Margaret L. Turner  
Appeals Judge